IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.467 OF 1984

1) Prithviraj Kasturchand Parakh,
since deceased through his legal heirs :-

1A) Shri Karodimal Prithviraj Parakh
R/at Pimpalgaon Baswant,
Tal. Niphad, Dist. Nashik.

1B) Sou. Mangalabai Shantilal Bafna,
R/at, Rambaug, No.2, Sushil Niwas,
At & Post Kalyan, Dist. Thane.

1C) Sou. Vijaya Amarchand Nimani,
R/at, Athavde Bazzar, At & Post
Bhusawal, Dist. Jalgaon.

1D) Sou. Pushpa Devendra Nahar,
R/at, At and Post Bol- Thane,
Tal. Nandgaon, Dist. Nashik.

1E) Sou. Sarala Satish Bora,
R/at, Asha Nursing Home, Near
Pavannagar, Bus-stop, Cidco No.4,
Nashik.

1F) Sou.Kamal Prakash Kumat,
R/at, Matrewadi, Tal. Dindori,
Dist. Nashik.

1G) Nita Abhay Nahar,
R/at, Savata Via Dhanu
Tal. Dhanu, Dist. Thane.
(Amended as per Court's order
dated 05/10/2001 in Civil
Application No. 7072/1997) **.. Appellants (Ori. Defendants)**

Versus

1) Hiramal Pandurang Maniar,
since deceased through his legal heirs :-

1a) Champalal Hiralal Maniyar
R/at, Narottam Co-operative
Housing Society,
Panchavati, Nashik City.

...2/-

1b) Mrs. Sushil Surajmal Chandak
R/at, Igatpuri, Zilla Nashik.

1c) Mrs. Shakuntala Hiralal Chandak
R/at. Post Igatpuri, Dist. Nashik.

1d) Mrs. Mathura Bandulal Rathi,
R/at. Post Yevla, Tal. Yevla,
Dist. Nashik.
(Amended as per court's order
dated 05/10/2001 in civil
application No. 7074/1997) **.. Respondents (Ori. Plaintiffs)**

Mr. C.R. Dalvi, Advocate for Appellant
Mr. R.A. Thorat, Advocate for Respondent

*CORAM : **S.R.SATHE,J.***
*DATED : **27th JUNE, 2006***

ORAL JUDGEMENT :-

1. The Appellant/original defendant No.1 in regular Civil Suit No. 181 of 1969 has preferred this appeal against the judgement and order passed in Civil Appeal No.211 of 1980, passed by the Court of Second Extra Assistant Judge, Nashik whereby the order passed by the Trial Court decreeing the Plaintiff's suit for exercising right of pre-emption and possession of the suit property in plaintiff's favour was confirmed and the appeal was dismissed. For the sake of convenience hereinafter the parties shall be referred to as Plaintiffs and Defendants.

2. The brief facts giving the rise to this appeal and relevant for the decision of this appeal are as under :-

The suit house bearing grampanchayat house No. 134

situated at Pimpalgaon, Baswant was originally owned by Tulshiram Gopal Sonar. He mortgaged the same to Krishnarao Talekar. Talekar filed a suit for recovery of mortgage money by sale of mortgaged property. That was suit bearing No. 40 of 1926. The same was decreed in favour of Talekar and he filed regular Darkhast No. 120 of 1934. In that Darkhast, Krishnarao purchased the house in Court auction and sale certificate was issued in his favour. Thus, he become the owner of the suit property. Afterwards, he filed a suit for obtaining possession of the house against Tulshiram Gopal Sonar, his mother Radhabai and two wives of Tulshiram namely Kausalya and Saraswati. During the pendency of the said suit, Tulshiram sold the portion of the suit house to Laxman Madhavrao Pradhan for Rs. 4000/- on 10/09/1936. Therefore, Laxman Pradhan was made a party i.e. Plaintiff No.2 in regular Civil Suit No. 212/1936. The said suit was compromised on 30/09/1936. By virtue of the compromise, Talekar gave the suit house to Tulshiram Sonar and his mother Radhabai on certain conditions. The main condition was embodied in clause-H of the said compromise. Initially, the house property bearing No. 133 and 134 (i.e. the house sold to Pradhan and house delivered to the defendants) were treated as one unit. The said clause-H was as under :-

" एच वादी नं 2 ची परिशिष्ट अ यातील मिळकत व वादी नं

1 ने प्रतिवादी 1/2 यास दिलेली मिळकत अशा दोन्ही मिळकती पूर्वी एकाच घराचे भाग होते. सबब प्रतिवादी 1/2 यांस त्यांना वादी 1 ने दिलेली मिळकत गहाण, खरेदी अगर अन्य त-हेने ***transfer*** करावयास असल्यास वादी 2 यांस या समजुतपत्राने वरील प्रतिवादी 1/2 चे मिळकती संबंधाने अग्रेसरत्वाचा हक्क ***right of pre-emption*** दिलेला आहे.

वरील प्यारा 5 मधील अ ते एच हे हक्क वादी 2 चे वारसास व ***representatives-in-interest*** यासही या समजुतपत्राने मिळतील ”

(The property of plaintiff No.2 in Schedule 2-A and the property returned by Plaintiff No.1 to Defendant Nos. 1 and 2 are the portions of original one house. As such, if Defendant Nos.1 and 2 have to mortgage, sell or otherwise transfer this property given to them by plaintiff No.1. Plaintiff No.2 shall have a right of pre-emption (Preferential right) in respect of this property under the compromise deed. The above rights described in Clause A to H of Para.5 above are also available to the heirs and representatives-in-interest of Plaintiff No.2 under the compromise.

3. The property sold by Krishnarao Talekar on

10/09/1936 to Laxman Madhavrao Pradhan was in his possession from the Sale Deed. After the death of Laxman Madhavrao Pradhan, his sons Dattatraya, Sharad, Ramakant, Pramod and his wife Kamlabai become the owners of the said property. They further sold the said property to Plaintiff Nos. 1 to 3 by registered Sale Deed dated 17/01/1957.

4. After the death of mother of Tulshiram Gopal Sonar, he become the owner of the said property. Tulshiram Gopal Sonar and his two wives namely Kausalya and Saraswati i.e. Defendant No.3 gifted the suit property to defendant No.2 Dhodiram Nana Sonar by registered gift deed dated 23/11/1962.

5. It is Plaintiff's case that he came to know about the above mentioned gift in the year 1964. According to him, he was in fact ready to purchase the property from deceased Tulshiram Gopal Sonar, however, Tulshiram and defendant Nos. 2 and 3 in collusion with each other executed the gift deed behind the back of Plaintiff. As Plaintiff had in fact received a right of pre-emption as the compromise decree passed in regular civil suit No. 212/1936, he filed regular civil suit No. 144/1964 against defendant Nos.2,3 and deceased Tulshiram and his wife Kausalya. However, in that suit, the defendant Nos. 2 and 3 contended that possession has not been given under the gift

deed to the donee and as such there was in fact no cause of action for the Regular Civil Suit No. 144 of 1964. The Plaintiff, therefore, withdrew the said suit on 24/06/1966 with the permission of the Court to file fresh suit on the same cause of action. Thereafter, with a view that Plaintiffs should not get opportunity to exercise their right of pre-emption, the defendant Nos. 2 and 3 executed the Sale Deed of the suit property in favour of defendant No.1 on 02/05/1969 for Rs. 21,000/- by Registered Sale Deed and also handed over the possession of the suit property. On 12/05/1969, the Plaintiff came to know about the sale deed executed in favour of defendant No.1. He, therefore, filed the present regular civil suit No. 181 of 1969 on 17/07/1969 for exercising his right of pre-emption received under the compromise decree passed in regular civil suit No.212 of 1936 and for possession of the suit property.

6. The defendant No.1 filed Written Statement Exh-30, while defendant Nos. 2 and 3 filed their Written Statements at Exh-33 and 34 respectively. The defendant No.4 was the tenant in the portion of the suit property and he filed his Written Statement Exh-35.

7. The defendant Nos. 1 to 3 contended that Plaintiffs have no right of pre-emption. According to them, the right created by clause-H of the decree in regular civil suit No.

212 of 1936 is in fact not a right of pre-emption. Such right can be there only in respect of transaction of sale. They further contended that clause-H is not applicable to the transfer in the nature of gift or lease and as such the Plaintiffs have not acquired any right and they are not the representatives-in-interest. The defendants also denied that Plaintiffs came to know for the first time about the gift deed in the year 1964. The defendants also contended if at all the Plaintiffs got any right of pre-emption that was on execution of the gift deed in favour of defendant No.2 and as such the suit filed in 1969 is barred by law of limitation. In addition to these contentions, several other contentions were also raised by the defendants, however, the same are now not relevant as at present the point involved is only with regard to law of limitation and as such it is not necessary to refer the said other contentions.

8. On the pleadings of the parties, the learned trial judge framed issues at Exh-37. After considering the evidence adduced by both the parties, learned trial judge came to the conclusion that right of pre-emption was created in favour of Laxman Pradhan or his representatives-in-interest in compromise decree passed in regular civil suit No. 212 of 1936. As the Plaintiffs are purchasers from Pradhan, they are entitled to take benefit of the said

compromise decree. It was also held that the gift deed was not complete for want of delivery of possession and therefore, cause of action accrued to Plaintiff for the first time on 02/05/1969 when for the first time the defendant No.2 got the possession. The Trial Court therefore held that Plaintiff's suit is within limitation. The Trial Court also held that Plaintiff has accordingly proved his right and the suit claim. Naturally, the trial court passed decree in favour of Plaintiffs.

9. Being aggrieved by the said judgement and order, the original defendant No.1 filed Civil Appeal No. 211/1980 in the Court of Second Extra Assistant Judge Nashik. The learned advocate for the appellant/ original defendant No.1 argued only one point. According to him, on the date of execution of the gift deed i.e. on 23/11/1962, the cause of action if any had accrued to Plaintiff and as such suit filed in 1969 was barred by Law of Limitation. As against this, respondent's advocate supported the judgement and decree passed by the Trial Court.

10. The learned First Appellate Judge came to the conclusion that for valid gift particularly in case of 'Hindus', the delivery of possession is not a condition precedent and register instrument is enough for that purpose. The First Appellate Court, however, held that the

transfer contemplated by virtue of clause-H in the decree is only a transfer in the nature of sale or mortgage and not a gratuitous transfer. The First Appellate Court, therefore, held that the execution of gift deed had not created any right of pre-emption and it is only when the Sale Deed was executed in favour of defendant No.1 on 02/05/1969 cause of action arose and that was the starting point of Limitation. The First Appellate Court therefore held that the suit filed by Plaintiff in 1969 was in time and the same was rightly decreed in favour of Plaintiff. The learned First Appellate Judge therefore dismissed the appeal.

11. The above mentioned order of dismissal of appeal is challenged by the original defendant No.1 in this second appeal. From the perusal of the record, it is clear that while admitting the appeal this Court ***(CORAM : S.J. DESHPANDE, J.)*** has passed following order.

> "Admit. Grounds 2,3,4 raise a question of law."
>
> The said grounds are as under.
>
> ***2)*** *The learned Judge should have held that the suit was barred by limitation.*
>
> ***3)*** *The learned Judge erred in law in misconstruing the compromise decree (exhibit 58) in Regular Civil Suit No.212 of 1936.*

4) *The learned Judge should have held that the right of pre-emption was in respect of any transfer.*

12. In this appeal before me Shri C.R. Dalvi, learned senior counsel has urged only two points. Firstly, he submitted that the learned First Appellate Judge has not properly construed clause-H of the compromise decree passed in Regular Civil Suit No.212 of 1936. According to him, the learned judge wrongly held that the word 'transfer' mentioned in Clause-H contemplates transfer by sale or mortgage and not one like gratuitous transfer by way of gift. According to him, clause-H is applicable even to a gift deed executed on 23/11/1962. Secondly, he canvassed before me that registration is necessary for a valid gift. Acceptance makes it operative and delivery of possession is not necessary for validity and as such the cause of action accrued on the date of gift deed. So the suit is barred by law of limitation as the same is not filed within 3 years from the gift deed. He also submitted that the Plaintiff has shown that the cause of action for the present suit filed in 1969 arose when possession is given to the Dhondiram. The cause of action under the earlier suit was different. So according to him, the present suit can not be said to be suit on the same cause of action and as such

Plaintiff would not get any benefit of the fact that earlier suit was withdrawn with permission to file fresh suit on the same cause of action. He, therefore, submitted that the appeal be allowed, the decree passed by the First Appellate Court be set aside and Plaintiff's suit be dismissed. As against this, Shri R.A. Thorat, learned advocate for the Plaintiff supported the judgement and order passed by the First Appellate Court. He submitted that admittedly possession of the suit property was not given under the gift deed but it was received by defendant No.1 on 02/05/1969. So, at that time, the gift was accepted and cause of action arose and the suit filed immediately thereafter, is in time.

13. From the perusal of clause-H of the compromise decree in Regular Civil Suit No. 212 of 1936 which is already reproduced in the earlier part of this judgement clearly goes to show that parties had agreed that when defendant Nos. 1 and 2 want to mortgage, sale or transfer in any other manner the suit property, the Plaintiff would be having right of pre-emption in respect of the property of defendant Nos. 1 and 2. The learned First Appellate Judge has held that this clause-H is not applicable in respect of the gift deed dated 23/11/1962 executed by Tulshiram and his wives in favour of defendant No.2. Shri Dalvi, learned senior counsel urged before me that this

view of the learned First Appellate Judge is not correct because right of pre-emption is not given only in respect of the transaction of mortgage and sale, but it was also made very clear that the same would be applicable in respect of any other transfer or transfer by any other mode than mortgage and sale. There is no doubt that as per the provisions of Transfer of Property Act, gift is a transfer. However, question arises whether the right of pre-emption which is embodied in clause-HA is also to be made applicable in respect of a gift. In order to find out whether this is also made applicable for gift, it is first necessary to see what right of pre-emption means.

14. At the outset, it must be mentioned that the word pre-emption is not defined either in the Transfer of Property Act or in any other statute. As per Black's Law Dictionary “Pre-emption” means the right to buy before other. This obviously means, right to buy before other buys. In other words, it means that this pre-emption is in respect of sale or purchase transaction. As per the meaning of the word 'pre-emption' given in the Law Laxicon, it is the right of purchasing property before or in preference to some other person. The Law of pre-emption imposes a clarified disability upon owners of the property, by restricting the vendors in the choice of vendees. The right of pre-emption is a statutory creation but can also be

created by contract and is recognized by custom. If we take into consideration the above mentioned meaning of right of pre-emption then it would indicate that in the instant case, though in clause-H, it was mentioned that the right of pre-emption would be available in case of any other transfer and gift is a transfer still then if we read the entire clause-H then it contemplates that the same is not applicable in respect of gift which is a gratuitous transfer. The Plaintiffs can not claim the property by way of gift merely because Tulshiram and his wives executed gift deed in favour of defendant No.2. From the meaning of the word 'right of pre-emption' it appears that it pre-supposes payment of the price. Admittedly, in the gift deed executed by Tulshiram and others, there was no consideration. The right of pre-emption contemplates payment of consideration. The said right can not be exercised without paying the consideration. So it appears that learned First Appellate Judge rightly construed the clause-H and held that the same is not applicable to transfer by way of gift.

15. Shri Thorat, learned advocate for the Plaintiffs strenuously argued before me that in the instant case, though gift deed was executed and registered still the transfer by way of gift as contemplated under the provisions of Transfer of Property Act was not complete in

the instant case. It is an admitted fact that possession of the suit property was not given to donee under the gift deed in question. It was therefore, tried to be argued that transaction of gift was not complete. However, it is well settled that for a valid gift, delivery of possession is not a condition precedent and registered instrument is enough for that purpose. The question arises whether merely because the gift deed was registered we can jump to the conclusion that the transaction of gift as contemplated under Transfer of Property Act was complete in the instant case. According to the learned advocate for the Plaintiff on 23/11/1962, the donee had not accepted the gift and as such the gift was not complete.

Section 122 of the Transfer of Property Act defines Gift as under :

> *"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."*

Section 123 of Transfer of Property Act says :

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

16. Though it does appear that the gift has been executed by Tulshiram and his wifes in favour of defendant No.2, there is no specific evidence on record to show that the defendant No.2 had in fact accepted the said gift of suit property when the said gift deed was executed and registered. So, the essential ingredient of acceptance of gift by donee or on behalf of the donee is lacking in the instant case. So, considering this aspect of the matter, it must be held that the transaction of gift was not in fact complete on the date when gift deed was executed. Thus, mere execution of the gift deed on 23/11/1962 had in fact not given any cause of action to the Plaintiffs to file the regular Civil Suit No. 144 of 1964. In fact that is why we

find that the Plaintiffs withdrew the suit with permission to file fresh suit on the same cause of action.

17. It is an admitted fact that on 02/05/1969 Sale Deed was executed in favour of the appellant/ the original defendant No. 1 by defendant No.2. Naturally, as per the provisions of clause-H in the compromise decree, Plaintiffs got right to claim the property as per Exh-58. So the period of limitation started on that day. It is not in dispute that the present suit is governed by Article-113 of the Limitation Act and as per the said Article, period of limitation is 3 years from the date when the right to sue accrued. As stated above, the right to sue accrued on 02/05/1969, the suit is filed on 17/07/1969. So, the same is obviously within time and there is no substance in the contentions of the defendant No.1 that the suit is barred by law of limitation.

18. There is another aspect of the matter. It is an admitted fact that the suit which was filed by the plaintiffs in 1964 i.e. Regular Civil Suit No. 144 of 1964 was withdrawn by the Plaintiff with permission to file fresh suit on the same cause of action. As I have already held above that the execution of gift deed on 23/11/1962 had not given rise to any cause of action for the Plaintiffs to file Regular Civil Suit No. 144 of 1964,

then, it must be held that Plaintiff was justified in withdrawing the said suit. The learned Advocate for the Plaintiff submitted that as the earlier suit was withdrawn with permission to file fresh suit on the same cause of action and in the present suit also it is specifically mentioned that the cause of action arose when the gift took place, the Plaintiffs are entitled to get benefit of the provisions of Section 14 of the Indian Limitation Act and in particular sub-section 3 thereof. If the period of pendency of the previous suit is taken into account the benefit of section 14 of the Indian Limitation Act has to be given to the Plaintiffs and thus it is clear that the present suit is in time because Plaintiff was certainly prosecuting the earlier suit in good faith and with due diligence. Sub-section 3 of Section 14 of the Limitation Act provides that notwithstanding anything contained in Rule-2 of Order-XXIII of the Code of Civil Procedure, the provisions of sub-section 1 shall apply in relation to fresh suit instituted with permission granted by the Court under Rule-1 of that Order, where such permission is granted on the ground that first suit must fail by reason of defect in the jurisdiction of the Court or other cause of like nature. So looking to the case from any angle i.e. even if it is held that cause of action for the present suit is the gift of the suit property or the sale deed executed by defendant No.2 on 02/05/1969 in favour of the

present appellant i.e. defendant No.1, the suit is certainly in time.

19. In view of the above discussion it is very clear that there is no substance in the argument advanced by the learned senior counsel for the defendant No.1 that the suit is barred by law of limitation. Both the courts below have rightly considered the point with regard to limitation and correctly decreed the suit in favour of the plaintiffs. There is no necessity to interfere with the findings of the lower courts. Hence, the appeal is dismissed with costs.

(S.R.SATHE,J)

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